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Sunday, July 29, 2007

Hohfeld without "the state"

Words like "rights," "freedoms", "liberties", "duties", and so on describe crucial ideas but are often used ambiguously in politics and the law. Lawyer Wesley Hohfeld early in the twentieth century in the United States developed a classification and technical terminology for these ideas that goes far towards eliminating much of this ambiguity.

First Hohfeld defined these ideas as relationships between persons. Second, he organized them into binary opposites and correlatives. Here are the binary opposites -- you either have them or you don't:

right/no-right
freedom/duty

(I'm substituting "freedom" where Hohfield and his followers have used "privilege" , "liberty", or even worse "permission" -- for reasons that should become apparent below). With respect to a given subject matter and under a given set of laws governing that subject matter, you either have a right or no right, never both. And you either have a freedom from duty or a duty, never both.

The most crucial aspect of this terminology is that these ideas are also related as correlatives -- the existence of one implies the existence of the other. Thus

right of A => duty of (at least) B
freedom of A => no-right of any other

Hohfeld's terminology is often described (e.g. by the legal scholars Corbin and Singer) in terms of "the state" that whose enforcement actions create rights (and thus duties) and whose lack of enforcement action creates "privileges" or "permssions". Regular readers of the blog will see at least one problem with this approach, but does Hohfeld terminology make sense independently of "the state"?

Not only do these terms make sense without "the state", they make even more sense without "the state" and even make sense independently of the existence of anything like a state. Stateless scenarios help to illuminate the meanings of Hohfeld's terms, and getting rid of "the state" will shed light on analysis of the origins of rights. For example, by distinguishing a "right" from a "freedom", I will create a much clearer description of John Locke's theory of a "social compact" which highlights some of its strengths and weaknesses. This generalization of Hohfeld terminology also allows us to apply it to real world situations involving conflicting jurisdictions and laws rather than the mythological monolithic state.

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Let's start with a Mr. Robinson Crusoe stranded alone on his tropical island. Crusoe is able to do anything he likes without legal or other coercive restriction, or indeed without a negative response by another person of any kind -- he has perfect freedom. But he can't sue or otherwise punish anybody, so he has, in Hohfeldian terms, no rights. Robinson Crusoe expemplfies the correlatives "freedom" and "no right".

Now let's strand a Mr. Geoffrey Dalrymple on the island with Mr. Crusoe. In a state of pure amorality and lawlessness (which is to be sure purely theoretical and in practice would not last for long), there are no rights of any kind. Crusoe has no duties and thus perfect freedom to do anything (kill Dalrymple, steal his food, and so on), and correlatively Dalrymple has no rights. Dalrymple for his part has no duties and thus perfect freedom, and and Crusoe has no rights.

Do we require a state to introduce rights into this situation? In fact we don't even need the introduction of a third party. To introduce rights and duties into this situation, Crusoe and Dalrymple merely need to enter into an agreement, a la Locke. This agreement could be as informal as a common cultural understanding or as formal as carving words on stone. Let's say Crusoe agrees not to commit a tort (battery, theft, etc.) against Dalrymple and Dalrymple agrees to not commit a tort against Crusoe. Crusoe now has rights (defined by tort law as he understands it, unless stated explicitly) against Dalrymple and Dalrymple now has tort rights (defind by tort law as he understands it, unless stated explicitly) against Crusoe. Crusoe correlatively has duties towards Dalrymple, and vice versa, and both correspondingly have their freedoms reduced. They have traded some freedoms for some rights. (This is a much clearer way of saying, in the older terminology in which "freedom", "rights", and so on were overlapping and often indistinct concepts, that people have traded away some rights in order to preserve other rights).

Of course the consequences of a right -- in particular the remedy available for the breach of a right -- is hardly the same as in a mature legal system with courts, police, etc. If one of Crusoe's rights is breached, for example by Dalrymple stealing his food, his only remedy is to take an action himself -- for example, steal back some food. Crusoe and Dalrymple would be wise to specify such remedies in their agreement. We can see how a third party, or even better courts and police, would help enforce such a remedy, but they, and much less "the state", are not necessary for the basic Hohfeldian ideas of right and duty to arise.

Corbin, in describing Hohfeldian terms, invoked "a giant" as a metaphor for "the state." It's easy to see that if a wise giant lived on the island it would be profitable for Crusoe and Dalrymple to agree to use that giant to hear their cases and enforce the remedy they had agreed upon. This corresponds to the "choice of forum" clause found in many modern contracts. But let's say there were two wise giants on the island, Giganticus and Gargantua. This multiplicity of giants would certainly confuse Corbin's (and Singer's) explanations of Hohfeld, but is in fact readily explicable in Hohfeldian and choice-of-forum terms. There are often great advantages to division of labor. Crusoe and Dalrymple could thus agree to divide up the subject matters of their agreement. They might, for example, choose Giganticus to adjudicate and enforce tort and property law, and Gargantua to adjudicate and enforce contract law (include this meta-contract).

Alternatively, if Giganticus is strong and Gargantua is wise, they might agree that Gargantua should decide the cases regarding any subject matter (i.e. act as a judiciary) and Giganticus should enforce them (i.e. act as an executive). As another alternative , the giants could agree on the division of subject matter jurisdiction betweem them, or divide between them adjudication and enforcement, and force their agreement on Crusoe and Dalrymple.

Each of these scenarios is a plausible one. None involve "the state", but each involve rights and correlative duties as well as freedoms and correlative lack of rights. The probability that the giants would enforce their own brand of law, rather than just enforcing whatever Crusoe and Dalrymple agree to, casts some doubt on Locke and other "social contract" theorists as providing an actual history rather than an ideal of the formation of legal systems or states. More likely is the model of Mancur Olson, in which "stationary bandits" out-competed "roving bandits" in the coercively competitive business of collecting taxes and thereby formed states (and, I'd add, formed other kinds of political property rights as well). All fodder for future posts.

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Ref: Hohfeld, W. N. Fundamental Legal Conceptions as Applied in Judicial Reasoning, ed. by W.W. Cook (1919); reprint, New Haven, CT: Yale University Press, (1964).

UPDATE: I have clarified my recasting of Locke's analysis and corrected a typo pointed out by a commentor.

Posted by Nick Szabo at 1:48 PM

6 comments:

Anonymous said...

Typo in the Giganticus/Gargantua paragraph, third to last, you probably meant:

Alternatively, if Giganticus is strong and Gargantua is wise, they might agree that Gargantua should decide the cases regarding any subject matter (i.e. act as a judiciary) and **Giganticus** should enforce them (i.e. act as an executive).

10:10 PM

nick said...

Indeed, thanks.

2:30 PM

Mike Huben said...

You seem to misunderstand Hohfeld in your Crusoe example. "Freedom" and "no-right" are correlatives because if you have freedom, others have no rights claims against you. In your example, you say Crusoe has no rights because there are no other people he could have rights against. In a simple case, you could have freedom to walk anywhere, and others would have no-rights (lack of rights to hinder your walking.) Yet despite your freedom, you could have rights against those others for any other thing.

Your analysis also suffers from avoiding the distinction between a rights claim (I say this is my right) and an enforced right (and I'm credibly threatening you about it.)

Rights claims are free, and can multiply like angels on a pinhead because unenforced claims do not physically conflict. Enforced rights are costly because they are physically enforced, and exclusive because they would otherwise physically conflict. Because normal ideas of rights are exclusive, they fit the definition of enforced rights.

Dalrymple and Crusoe start with rights claims, perhaps mutually agreed to. Some people say acknowledgement is what transforms a claim into a right, but that is merely a mechanism of enforcement in societies where word is considered
bond, and people who break their word are penalized. If they have penalties in mind, they are attempting to create rights.

But created rights are descriptive fictions: how well the world is compelled to fit the model is the question. The degenerate case of Dalrymple and Crusoe doesn't fit the model of rights well because the enforcement is questionable. The better the enforcement, the closer the right works as a description.

Rights patently don't require states: all they require is enforcement. They can be enforced by any societal mechanism, including

traditions, shunning, you name it. Enforcing rights through states is an economic proposition, not a necessity.

5:36 PM

nick said...

It's shameful for you to claim that I "seem to misunderstand" this -- I don't -- but you are correct insofar as my example of Crusoe by himself may confuse, as there are two different no-rights going on here. Crusoe has full freedom and nobody has any rights against him (because there is nobody to have such rights). That's the Hohfeldian correlative. (Because Hohfeldian terms are based on relations between persons, here we have to invoke a "nobody", a null person, to define the correlative). Crusoe also has no-rights. You're correct that Crusoe's own no-rights are not the the correlative to his own freedom.

The Crusoe/Dalrymple example of lawlessness -- where there is still full freedom and no rights between two people -- serves to clarify where the correlative lies.
Crusoe's no-rights are Dalrymple's freedom and vice versa.

MH: "Your analysis also suffers from avoiding the distinction between a rights claim (I say this is my right) and an enforced right (and I'm credibly threatening you about it.)"

The claim is either frivolous (in the broad sense of being unenforceable, whether due to its lack of plausibility or for lack of enforcement mechanism) or a threat of some degree (plausible, credible, or near certain). While those are important distinctions they are not necessary to understand the basics of Hohfeld, nor to clarifying Locke's theory.

MH -- "The degenerate case of Dalrymple and Crusoe doesn't fit the model of rights well because the enforcement is questionable. The better the enforcement, the closer the right works as a description."

That enforcement is questionable doesn't stop it from being well-defined logically as a right. Furthermore, there are a variety of scenarios where Crusoe can enforce his rights against Dalrymple and vice versa. Revenge may be primitive (and oh so unpopular in a world where we are trained from birth to trust "the state" for any such thing), but it is hardly nothing.

11:35 AM

nick said...

Indeed, I'd go so far as to say that revenge is the origin and basis of justice. Crusoe taking revenge because he believes Dalrymple has breached their implicit or express understandings about rights and duties -- and vice versa -- rather than invoking a "wise giant" or "the state" is the proper starting point for the analysis of justice.

Of course, you like me have probably been trained since kindergarten to stand aghast at such statements -- how dare I suggest that "taking the law into your own hands" is a more original and general form of justice than trusting your parents, your teachers, or "the state" to mete out justice? It goes against everything these authorities have drilled into our heads. All our lives we have been trained to reflexively believe that revenge is criminal and to defer it (in the rarified form of "justice") to some higher authority. To take the law into your own hands is considered by believers in "the state" to be always itself a criminal act.

And indeed, I do not deny that such authorities (which are in fact far more multifarious than "the state") are often more efficacious than revenge. But more importantly, it is a world in which there were no standards regarding rights and duties, and the associated remedies, that would be a very awful place. But in fact in our real legal system, which has to at least some extent defer to reality, there are many situations where taking the law into your own hands is perfectly legal and proper. There are many more situations where it is proper and it would be quite useful to make it legal -- but we don't because most legislators and judges like practically all moderns reflexively believe in and worship "the state". Even most libertarians reflexively believe in "the state", and tilt at it like a vast windmill. What should rather be attacked is the ideology that constructs and assumes this great fiction -- include libertarians who fulminate at "the state", and consider that if it magically disappeared the world would be a utopia. But in fact it already does not exist, and never existed, and the world is not and never has been a utopia.

More basically and relevant to this thread, for accurate analysis of political and legal systems, it is "taking the law into your own hands", and not the Romanist and now dominant mythology of "the state", that is the rational starting point.

Given this far more accurate starting point, it is far easier to see the various alternatives -- political property rights, choice of law and choice of forum being supreme among these -- to the Romanist mythology of "the" monolithic state.

12:09 PM

Mike Huben said...

I appreciate your admission that your example "might confuse". But perhaps you should have admitted even more.

You don't seem to distinguish between the Hohfeldian "no-right" concept (which is the lack of a specific right) and a more general, English language statement of "no rights" because he cannot sue.

You write "Hohfeld defined these ideas as relationships between persons." But then you hypothesize only one person, Crusoe, and claim he has "perfect freedom". Who does he have this relationship with, to have Hohfeldian freedom?

You write 'It's shameful for you to claim that I "seem to misunderstand" this': well, this example isn't merely an ambiguity, it's a first-class logical blunder about null sets of persons. You seem to have that overweening libertarian arrogance that your unorthodox interpretation makes you correct and everybody else fools, and it's shameful for us not to recognize your rightful superiority. Sorry, that provokes giggles.

And then you go on to an amazing rant, conglobulating and conflating rights, justice, revenge and who knows what else. You willy-nilly spew accusations that other people 'reflexively believe in and worship "the state"' because of the 'Romanist and now dominant mythology of "the state"', yet ignore the fact that it's easily documented that there have always been countervailing forces/interests besides the state, such as the Roman household.

You write "for accurate analysis of political and legal systems, it is "taking the law into your own hands"... that is the rational starting point." In other words, you're talking simple Hobbesian anarchy. I agree with that: it's a much better place to start than with Lockean or other mythology. "Taking the law into your own hands" has been abandoned for alternative methods of enforcement innumerable times in many societies for a wide variety of good reasons: not mere mythology. There's a fair-sized modern law and economics literature explaining why it is economically inefficient in many cases. And of course, Locke wrote about the problems of partiality.

The distinction between a rights claim and an enforced right is crucial to applying Hohfeld to situations without a state. Hohfeld's analysis is premised within a legal system with enforcement. When you put people on a desert island, it is comical to think the same premises hold.

For example, say Crusoe says "This is my palm tree." And Dalrymple also says "This is my palm tree." These are rights claims. They are free, and can conflict. But neither of them actually has a right unless there is enforcement.

Where there is a right, there is a remedy. - Broom's Legal Maxims

You are correct that revenge is one method of remedy for rights. But it's also a remedy for many things that we won't acknowledge as rights: things we consider mere emotional impulses. So we also need to consider the fact that rights arise not only out of individual interests, but also out of other emergent phenomena such as social norms. Desert island scenarios are insufficient to show these sorts of emergent phenomena.

I've been hunting for something coherent to understand rights for a long time. I've not yet found it spelled out in one place, and have had to roll my own. This is what I've come up with so far:

A "right" is of the form "RIGHTHOLDER claims a right to CONTROL a THING, receiving a BENEFIT; creating a reciprocal obligation (or

duty) for OTHERS to permit this despite incurring INCONVENIENCES because of threatened HARMS produced at a PRICE by ENFORCERS". (It can get lots more complicated.)

BENEFIT (B), PRICE (P), HARMS (H) and INCONVENIENCES (I) are all values that are assumed to be fungible in some manner. That doesn't require the form of modern markets: indeed, tit-for-tat and other strategies that work with a simpler form of fungibility increasing or decreasing life, labor, time, pleasure, pain, or other subjectively valued things.

Rights will tend to be created when B > P, and H > I.

Modern ideas of "good" or "moral" rights also meet the constraint (B - P) > I.

For example, "Joe (R) claims a right to farm (C) on his property (T) for commercial sales (B), and neighbor Fred (O) has to tolerate the odors, noise, traffic, etc. (I) because if he interferes he will be fined (H) in a civil lawsuit (P) brought by Joe in court (E)."

For example, "Thomas (R) claims a right of chattel (C) over Dred (T) for slave labor (B), and Dred (O) has to tolerate the indignity (I) because if he attempts to escape or resists, he will be hunted down or punished (H) by privately hired (P) slave hunters or overseers (E)."

If you know of a similar or better description, I'd like to know.

8:40 PM

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